

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN J. McGEE

Claimant

VS.

CARDINAL BUILDING SERVICES

Respondent

AND

RELIANCE NATIONAL INSURANCE COMPANY

Insurance Carrier

Docket No. 239,953

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on April 30, 1999.

ISSUES

This appeal follows a second preliminary hearing. After the first hearing, held March 10, 1999, the Administrative Law Judge denied benefits, stating that claimant had failed to meet his burden. Although the Order does not state which issue or issues the Administrative Law Judge considered to be inadequately proven, respondent denied both accident and notice. Neither party appealed from the initial Order of March 11, 1999.

A second hearing was held on March 14, 1999, where the only new evidence presented was the affidavit of Mr. John Owens. A deposition of Mr. Owens was then taken April 19, 1999, and on April 30, 1999, the Administrative Law Judge entered the Order from which the current appeal is taken. In the second Order, the Administrative Law Judge simply stated that the claimant's request to reverse the previous Order was denied.

The two issues raised by the parties on appeal are: (1) Did claimant prove accidental injury arising out of and in the course of employment? and (2) Did claimant prove that he had given timely notice as required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the evidence, the Appeals Board concludes that the Order should be affirmed.

At the hearing on March 10, 1999, the claimant testified to an accidental injury to his low back while picking up paper to be recycled. He was working with Mr. John Owens at the time and claims to have notified his supervisor, Mr. Medina. Mr. Medina apparently no longer works for respondent and his testimony has not been offered by either party.

Respondent offered evidence from Ms. Michelle Burdett indicating claimant advised respondent after the date of the alleged accident that he was not coming to work because he was sick but did not mention a back injury. Claimant then quit his employment and turned in his work uniform three or four days later. He did not inform anyone that he was leaving because of an injury. Claimant immediately applied for unemployment compensation benefits. Ms. Burdett indicates claimant advised her that he was claiming a work-related injury approximately 30 days after the alleged accident. Respondent immediately referred claimant for medical care.

Claimant's testimony at the initial hearing is not consistent. He first indicates that when he turned in his uniform he quit. He then suggests he may have been bringing it in for cleaning. He initially acknowledges he may not have mentioned his back at the time he quit because he thought he told Ms. Burdett earlier. In a later exchange with the Administrative Law Judge, claimant indicates that he told respondent he could not work because his back was hurting but he was bringing the uniform in anyway because it was dirty. Claimant also acknowledges that what he told his supervisor was that he was sick. He suggests that by sick he meant the back injury.

The deposition testimony of John Owens conflicts in part with the affidavit he has given and also in part with an earlier recorded statement. In the affidavit, Mr. Owens very specifically states that claimant told him he had experienced sharp pain in his back when lifting paper. His deposition testimony more generally suggests that he observed claimant grimacing but that claimant did not really describe the injury in any detail. The earlier recorded statement suggests that claimant told Mr. Owens that he was sick and that claimant was holding his side above his hip.

Based upon the inconsistent evidence, and giving some deference to the Administrative Law Judge's evaluation of the credibility of witnesses who testified before him, the Board finds that the claimant has failed to meet his burden of proving accidental injury arising out of and in the course of his employment. The Board also finds claimant did not give timely notice. Respondent's contention that claimant did not give notice at the time of the accident is supported in part by the fact respondent immediately referred claimant for medical care once claimant did give notice approximately 30 days after the alleged accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on April 30, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

c: Eric Kjorlie, Topeka, KS
John David Jurcyk, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director